Supreme Court, U.S.
FILED
97 • 464 SEP 12 1997
OFFICE OF THE CLERK

No. 97-

In the Supreme Court of the United States

OCTOBER TERM, 1996

CPC INTERNATIONAL INC., PETITIONER

v.

AEROJET-GENERAL CORPORATION, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

J. MICHAEL SMITH
Miller, Johnson, Snell & Cummiskey, P.L.C.
800 Calder Plaza Building
250 Monroe, NW
Grand Rapids, MI 49503
(616) 831-1700

KENNETH S. GELLER*
DONALD M. FALK
Mayer, Brown & Platt
2000 Pennsylvania Ave. NW
Washington, DC 20006
(202) 463-2000

* *Counsel of Record*

12 pp

QUESTION PRESENTED

The petition for a writ of certiorari in No. 97-296 asks this Court to review the decision of the Sixth Circuit only to the extent that it held that CPC International Inc. is not liable under the Comprehensive Environmental Response, Compensation, and Liability Act as an "operator" of a particular "facility" that was owned and operated by its subsidiary. In the same decision, the Sixth Circuit held that Aerojet-General Corporation, the parent of two corporations that later owned and operated the same facility, and against which CPC has a pending action for contribution, also is not liable as an "operator" of that facility.

The cross-petition presents the question whether, if the Court grants the petition for a writ of certiorari in No. 97-296, it also should review the Sixth Circuit's holding that Aerojet-General is not liable as an "operator."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties listed in the caption, the respondents are the United States, Cordova Chemical Company of Michigan, Cordova Chemical Company, and the Michigan Department of Environmental Quality.[1]

Petitioner CPC International Inc. has no parent companies and has the following nonwholly owned subsidiaries:

Circulo Esmeralda, S.A. de C.V.
Corn Products Co. (India) Ltd.
Maghreb Alimentation S.A.
Maizena Brasil S.A.
Productos Modificados, S.A. de C.V.
Refinacoes de Milho, Brasil Ltda.
Refinerias de Maiz SAICF
S.B. Penick del Ecuador S.A.

---

[1] The petitioner in No. 97-296, and a respondent in this case, is the Michigan Department of Environmental Quality, which formerly was known as the Michigan Department of Natural Resources. See No. 97-296 Pet. ii. For consistency with the petition in No. 97-296 and the proceedings in the courts below, we will continue to refer to the State agency as the "MDNR."

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE CROSS-PETITION	4
CONCLUSION	7

TABLE OF AUTHORITIES

Page

Cases:

AM International, Inc. v. *International Forging Equipment Corp.*, 982 F.2d 989 (6th Cir. 1993) 6

Cordova Chemical Co. v. *Michigan Dep't of Natural Resources*, 212 Mich. App. 144, 536 N.W.2d 860 (Mich. App.), lv. to appeal denied, 453 Mich. 899, 554 N.W.2d 319 (1996) 5

Federated Department Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981) 6

Statutes:

42 U.S.C. § 9601 *et seq.* 1

42 U.S.C. § 9607(a)(1) 3

42 U.S.C. § 9607(a)(2) ..... *passim*

42 U.S.C. § 9613(f) 3, 6

Miscellaneous:

R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE (7th ed. 1993) 6

Supreme Court Rule 12.6 6

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Petitioner CPC International Inc. respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in favor of Aerojet-General Corporation in this case if the Court grants the petition in No. 97-296.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.1a-42a), sitting *en banc*, is reported at 113 F.3d 572.[2] The opinion of the panel (Pet. App. 45a-77a) is reported at 59 F.3d 584. The opinion of the district court (Pet. App. 85a-142a) is reported at 777 F. Supp. 549.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1997. The petition for a writ of certiorari in No. 97-296 was docketed on August 15, 1997. This conditional cross-petition was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and S. Ct. R. 12.5.

STATUTE INVOLVED

Pertinent provisions of the Comprehensive Environmental Response, Compensation, and Liability Act are set forth at Pet. App. 146a-149a. Section 113(f)(1) of that Act, codified at 42 U.S.C. § 9613(f)(1), provides in pertinent part:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title * * * .

---

[2] "Pet." and "Pet. App." refer respectively to the petition and to the appendix to the petition in No. 97-296. See S. Ct. R. 12.5.

STATEMENT

1. This case involves the allocation of liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"), for the cleanup of a site near Muskegon, Michigan. Four separate successive owners manufactured chemicals at the Muskegon site: Ott Chemical Co. ("Ott I"), from 1957 to 1965; Ott Chemical Co. ("Ott II"), a wholly-owned subsidiary of cross-petitioner CPC International Inc., from 1965 to 1972; Story Chemical Co., from 1972 until it went bankrupt in 1977; and two wholly owned subsidiaries of cross-respondent Aerojet-General Corp. — Cordova Chemical Co. ("Cordova/California") and Cordova Chemical Co. of Michigan ("Cordova/Michigan") — from 1977 to 1986. Pet. App. 87a-89a.

Several CERCLA claims, counterclaims, and cross-claims were raised in a consolidated action in the United States District Court for the Western District of Michigan. In 1991, the district court found CPC, Aerojet, Cordova/California, and Cordova/Michigan jointly and severally liable for $1.65 million in response costs (plus future costs) incurred by the Michigan Department of Natural Resources ("MDNR") at the site. Pet. App. 144a.

The district court held that CPC was liable as an "operator" of the Muskegon facility under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2). In the court's view, "section 107(a)(2) liability may attach to a parent corporation in two ways": direct liability, or liability through common law veil-piercing. Pet. App. 121a. The court stated that "a parent corporation is directly liable under section 107(a)(2) as an operator" whenever "it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste." *Id.* at 123a. Applying that test to the facts of this case, the court found

CPC liable because "the evidence shows active participation and control by CPC in Ott II affairs" (*id.* at 126a).[3]

Based on "the same framework used in CPC's case" (Pet. App. 134a), the district court also held that Aerojet was liable as an "operator" of the Muskegon facility. The court concluded that, "[a]s with CPC's involvement with Ott II, Aerojet's participation and control over * * * Cordova/California and Cordova/Michigan shows that the parent operated the facility." *Id.* at 135a. In addition, the court held that Aerojet was separately liable as the "present owner" of the facility under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), because Cordova/Michigan owned the Muskegon site and there was a basis under Michigan law to pierce Aerojet's corporate veil and charge the parent with the obligations of its subsidiary. *Id.* at 132a-134a.

CERCLA provides "[a]ny person" with a right to "seek contribution from any other person who is liable or potentially liable under [42 U.S.C.] section 9607(a)." 42 U.S.C. § 9613(f). CPC's contribution action against Aerojet and its subsidiaries was among the actions consolidated below. See Pet. App. 85a. The district court did not resolve any of the contribution claims, however, *id.* at 139a-140a, but dismissed them without prejudice. *Id.* at 81a. CPC reasserted its contribution claims against the Aerojet defendants in a new complaint filed in June 1994. *CPC International Inc.* v. *Aerojet-General Corp.*, No. 1:94 cv 432 (W.D. Mich., S. Div.). That case is in abeyance pending the final resolution of the liability issues.

2. The Sixth Circuit, sitting *en banc*, reversed the judgments against CPC and Aerojet under Section 107(a)(2). Contrary to the district court, the court of appeals did not believe that "operator" liability could be imposed on a parent corporation based solely on "the degree of control exerted by

---

[3] In light of this conclusion, the district court did "not reach the question of whether CPC should be held liable under CERCLA through common-law veil-piercing" (Pet. App. 126a).

the parent over its subsidiary." Pet. App. 13a. Instead, the Sixth Circuit held that a parent may be held liable under Section 107(a)(2) only (a) "where the parent directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary" or (b) "by piercing the corporate veil" (*ibid.*).

Applying that standard, the court of appeals held that there was no support in the record for imposing "operator" liability on either CPC (Pet. App. 13a) or Aerojet (*id.* at 16a). The court of appeals also reversed the district court's decision that Aerojet could be held liable as an "owner," finding that the facts "fall somewhat short of what is required to pierce the corporate veil under Michigan law." *Id.* at 15a.

REASONS FOR GRANTING THE CROSS-PETITION

In the certiorari petition filed in No. 97-296, the MDNR asks this Court to decide whether CPC may be held liable under Section 107(a)(2) of CERCLA as an "operator" of its subsidiary's facility. As CPC's brief in opposition will explain, there is no reason to grant review of the Sixth Circuit's decision in this case. If the Court does grant review in No. 97-296, however, it should grant this cross-petition as well to consider the companion holding that absolved Aerojet of liability as an "operator" of the Muskegon facility.

Although the courts below disagreed on the content of the legal standards supporting the imposition of "operator" liability on the parent corporation of a company that operates a facility, both courts agreed that the claims against CPC and Aerojet rested on "*precisely the same basis* for liability" under Section 107(a)(2). Pet. App. 16a (emphasis added). The district court applied a *single* legal standard to CPC and Aerojet alike when it held that they *were* "operators" (*id.* at 126a, 134a-135a), and the court of appeals applied a *single* standard of "operator" liability to CPC and Aerojet alike in holding that they were *not* "operators" (*id.* at 12a-13a, 15a-16a). Accordingly, it would be

odd indeed to consider the question of "operator" liability only as it applied to CPC.

Moreover, in the Sixth Circuit Aerojet defended against operator liability solely on the ground that no disposal had taken place while its subsidiaries operated the Muskegon facility, in effect conceding that if the Cordova companies were operators, their parent was an operator as well. See Aerojet Appellants' C.A. Br. 24-32; Aerojet Appellees' C.A. Br. 28-36; Aerojet Supplemental Appellants' C.A. Br. 20-27. The court of appeals' holding on "operator" liability thus provided Aerojet — which, unlike its subsidiaries, is solvent — with relief from liability on a ground that Aerojet itself did not urge. Nonetheless, for reasons unexplained in the petition, the MDNR has chosen to seek review only of the portion of the judgment in favor of CPC.[4]

It would be grossly unfair to allow the judgment in favor of Aerojet to become final if there is any chance that the judgment in favor of CPC might be overturned. To begin with, the evidence that Aerojet actually operated the Muskegon facility was far stronger than that against CPC. Although the district court found that the day-to-day operations at the Muskegon site between 1965 and 1972 were formulated and implemented by Ott II management, *not* CPC (see Pet. App. 95a), the court found, by contrast, that Aerojet was directly involved in the operations of the facility from 1977 on, when the facility was owned first by Cordova/California and then by Cordova/Michigan (*id.* at 114a-115a). In fact, Aerojet itself

---

[4] Although the MDNR has not discussed the issue, the most likely reason why it has not sought review against Aerojet is that the Michigan state courts, in parallel litigation, have held that the MDNR must indemnify Aerojet and its subsidiaries against any CERCLA liability they may incur at the Muskegon facility. See *Cordova Chemical Co.* v. *Michigan Dep't of Natural Resources*, 212 Mich. App. 144, 536 N.W.2d 860 (Mich. App.), lv. to appeal denied, 453 Mich. 899, 554 N.W.2d 319 (1996). MDNR appears to have crafted its petition in an effort to relieve itself of its own potential liability as Aerojet's indemnitor.

negotiated the acquisition of the Muskegon site for what was then its Cordova division (*id.* at 112a), incorporating Cordova/California "just before acquisition" (*id.* at 113a) and Cordova/Michigan a year later (*id.* at 114a).

What is more, the district court also concluded that Aerojet's domination of its Cordova subsidiaries was so complete that liability could be imposed by piercing the parent's corporate veil (Pet. App. 132a-133a)[5] — a finding that the court did not make in regard to CPC. In these circumstances, in the unlikely event that this Court chooses to review the question whether liability may be imposed under CERCLA on the parent corporations of companies that operated the Muskegon facility, it should do so on the complete record that was before the Sixth Circuit.

A gerrymandered review of the "operator" liability issue, as it relates to the Muskegon site, might have grossly inequitable consequences for another reason. There is at least some possibility that CPC's right to contribution from Aerojet under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), might be extinguished by a failure to challenge the portion of the Sixth Circuit's judgment in favor of Aerojet, see *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 399 n.4 (1981), because a party adjudged not liable under Section 107(a) cannot be subject to contribution under Section 113(f). See, *e.g.*, *AM International, Inc.* v. *International Forging Equipment Corp.*, 982 F.2d 989, 999 (6th Cir. 1993). Of course, Aerojet, as a party in the court of appeals, is a respondent in No. 97-296 (see S. Ct. R. 12.6; Pet. ii), entitled to file briefs in this Court and bound by this Court's judgment. See R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE 324 (7th ed. 1993). Out of an abundance of caution, however, we have filed this cross-petition to bring before the Court the judgment in favor of Aerojet, in order to preserve CPC's right to obtain

---

[5] For example, the Cordova "subsidiaries' board[s] of directors were inactive and nearly non-existent" (Pet. App. 115a-116a).

contribution from Aerojet in the event that this Court were to agree with the MDNR on the meaning of the term "operator" in Section 107(a)(2).

In sum, if the Court grants the petition in No. 97-296, it should grant this cross-petition as well. The MDNR's decision not to seek relief against Aerojet in this Court should not indirectly jeopardize CPC's ability to obtain contribution from Aerojet if the judgment against CPC is reinstated. The district court imposed joint and several liability on CPC and Aerojet under Section 107(a)(2), and the court of appeals reversed as to both defendants on a common legal theory. If the Court agrees to review that legal ruling, CPC and Aerojet should be similarly situated.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be granted if the Court grants the petition in No. 97-296.

Respectfully submitted.

J. MICHAEL SMITH
Miller, Johnson, Snell & Cummiskey, P.L.C.
800 Calder Plaza Building
250 Monroe, NW
Grand Rapids, MI 49503
(616) 831-1700

KENNETH S. GELLER*
DONALD M. FALK
Mayer, Brown & Platt
2000 Pennsylvania Ave. NW
Washington, DC 20006
(202) 463-2000

* *Counsel of Record*

SEPTEMBER 1997

Supreme Court, U.S.
FILED
NOV 12 1997
CLERK

(2) (4) (2)

Nos. 97-296, 97-454 and 97-464

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

UNITED STATES OF AMERICA (#97-454) and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY (# 97-296),
Petitioners
v.
CPC INTERNATIONAL, INC., et al.
Respondents
and
CPC INTERNATIONAL, INC. (# 97-464),
Cross-Petitioner
v.
AEROJET-GENERAL CORPORATION, et al.,
Respondents

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY OF MICHIGAN AND CORDOVA CHEMICAL COMPANY OPPOSING PETITIONS

John D. Tully*
Robert J. Jonker
Warner Norcross & Judd LLP
900 Old Kent Building, 111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
*Counsel of Record

2488

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

RULE 29.6 STATEMENT v

SUPPLEMENTAL STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITIONS 5

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

ABB Industrial Systems Inc. v. Prime Technology, Inc., 120 F.3d 351 (2d Cir. 1997) 12, 14, 15

Cordova Chemical Co. v. Department of Natural Resources, 212 Mich. App. 144, 536 N.W.2d 860 (1995), *lv. denied*, 453 Mich. 899, 554 N.W.2d 319 (1996) 4, 12, 16

CPC Int'l Inc. v. Aerojet-General Corp., 777 F. Supp. 549 (W.D. Mich. 1991) 1, 3

Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107 (11th Cir. 1993) 5, 9

Joslyn v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990) . . 11

Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3d Cir. 1993) 9

Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) . . 17

Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, *cert. denied*, 506 U.S. 940 (1992) 8, 14

Riverside Market Development Corp. v. International Building Products, Inc., 931 F.2d 327 (5th Cir. 1991) 11

Schiavone v. Pearce, 79 F.3d 248 (2d Cir. 1996) 9

United States v CDMG Realty Co., 96 F.3d 706 (3d Cir. 1996) 12

United States v. Carolina Transformer Co., Inc., 739 F. Supp. 1030 (E.D.N.C. 1989) 9

United States v. Carolina Transformer Co., Inc., 978 F.2d 832 (4th Cir. 1992) 8

United States v. Cordova Chemical Co. of Michigan, 113 F.3d 572 (6th Cir. 1997) (*en banc*) . . . 1, 7, 10, 16

United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990) 5, 9

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1981) . 17

Warth v. Seldin, 422 U.S. 490 (1975) 17

STATUTES

42 U.S.C. § 9607(a)(2) 5, 8, 10-13

42 U.S.C. § 9607(b) 16

42 U.S.C. § 9613(b) 7

MISCELLANEOUS

114 Cong. Rec. S11336-01 (1995) 6

13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533.2, at 241 n. 28 (2d ed. 1984) 4

40 C.F.R. § 300, Appendix B (1997) 7

62 Fed. Reg. 50,442 (1997) 6

George W. Dent, *Limited Liability and Environmental Law*, 26 Wake Forest L. Rev. 151, 160 (1991) 10

Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 Nw. U. L. Rev. 259, 315 (1992) 10, 11

Note, *The Case Against Intermediate Owner Liability Under CERCLA for Passive Migration of Hazardous Waste*, 93 Mich. L. Rev. 609 (1994) 14

Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency, Pub. No. 9320.7-061, Supplementary Materials: National Priorities List, Proposed Rule and Final Rule 25-29 (April 1997) 6

S.8, 105th Cong., 1st Sess. § 802 (1997) 6

Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, § 18.2 at 710 (7th ed. 1993) 4

RULE 29.6 STATEMENT

The parent company of Cordova Chemical Company of Michigan is Cordova Chemical Company. The parent company of Cordova Chemical Company is Aerojet-General Corporation. The parent company of Aerojet-General Corporation is GenCorp, a publicly traded company. The filing parties do not have non-wholly-owned subsidiaries, but Aerojet-General Corporation does hold less than 1% of the stock of Megabar Explosives Corp., a Utah corporation.

SUPPLEMENTAL STATEMENT OF THE CASE

This case involves the allocation of responsibility for pollution caused by prior owners and operators of a site now owned by Cordova Chemical Company of Michigan, a subsidiary of Cordova Chemical Company, which is in turn a subsidiary of Aerojet-General Corporation ("Aerojet"). Neither Aerojet nor any of its subsidiaries caused or contributed to any contamination at the site. All of the contaminants in the soil and groundwater of the site were deposited between 1957 and 1977, before Aerojet or its subsidiaries had any involvement whatsoever with the site.

Neither Aerojet nor its subsidiaries should bear any liability for the contamination caused by others at the site. The district court recognized that Aerojet's subsidiaries operated in an environmentally safe manner, and found as a matter of fact under Fed. R. Civ. P. 52 that:

> During their period of operations, Cordova/Michigan and Cordova/California neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras. Before beginning chemical manufacturing, Cordova/Michigan repaired the equalization basin and chemical sewer system. When operating, Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility.

CPC Int'l Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 556 (W.D. Mich. 1991) (U.S. Pet. App. 62a). The Court of Appeals noted the finding, *United States v. Cordova Chemical Co. of*

Michigan, 113 F.3d 572, 576-77 (6th Cir. 1997) (*en banc*) (U.S. Pet. App. 6a), and no party contested it on appeal. As the Court of Appeals stated: "[T]he release of hazardous substances appears to have been *caused* solely by the predecessors of [Aerojet and its subsidiaries]." *Id.* at 583, U.S. Pet. App. 23a-24a. Aerojet itself has never owned this site or conducted its operations there.

Aerojet and its subsidiaries initially became involved with the site in 1977 when Cordova Chemical Company purchased it from a federal bankruptcy trustee under a Stipulation and Consent Order with the State of Michigan. Under the Stipulation and Consent Order, Cordova Chemical Company agreed to contribute $600,000 to the State's cleanup efforts at the site, and the State of Michigan promised to release Cordova and hold it harmless from all potential liability for pollution left by the site's prior owners:

> 6. It is anticipated that said $600,000 will be sufficient to reimburse the Department of Natural Resources fully for all costs and expenses incurred by it in connection with its obligations hereunder and, in addition, to provide at least $100,000 towards the provision of an alternative water supply system to serve residents and commercial establishments whose water supply wells are or may become affected by the groundwater contaminants emanating from the Story Chemical Corporation property. The Cordova Chemical Company shall not have any liability in the event that said $600,000 is not in fact sufficient for the intended purposes nor shall it have any responsibility whatsoever in connection with the provision of any water supply system or potable water pending availability of an

> acceptable water supply system to said residents and commercial establishments.
>
> Cordova Chemical Company shall not have any responsibility or liability in connection with any other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary or advisable in connection with the contamination emanating from the Story Chemical Corporation property, including, without limitation, the creation, maintenance and operation of any purge wells.
>
> . . .
>
> 8. Compliance with this Consent Order shall constitute full satisfaction of all relief, civil or administrative, which might have been, or which otherwise might be obtained against Cordova Chemical Company for any contamination of groundwater or other pollution, injury, or damage, to the environment or otherwise, caused by acts or omissions of Story Chemical Corporation facilities, which acts, omissions or operations occurred prior to the effective date of this Consent Order, whether the contamination, pollution, injury or damage occurs prior to or after the effective date hereof.

See CPC, 777 F. Supp. at 565 (U.S. Pet. App. 86a-87a) (quoting from the Stipulation and Consent Order). Without this promise from the State of Michigan, Cordova Chemical Company would not have acquired the site.

The Michigan Court of Appeals has ruled that the Stipulation and Consent Order obligates the State to bear financial responsibility for any CERCLA liability assigned to Aerojet and its subsidiaries. *Cordova Chemical Co. v. Department of Natural Resources*, 212 Mich. App. 144, 536 N.W.2d 860 (1995). The Michigan Supreme Court has denied the State's request for leave to appeal. *See Cordova Chemical Co. v. State, Michigan Department of Natural Resources*, 453 Mich. 899, 554 N.W.2d 319 (1996). Accordingly, the question presented by the Petition of the United States and the Conditional Cross-Petition of CPC International is, for Aerojet, of primarily academic interest because ultimate financial responsibility for any CERCLA liability assigned to Aerojet will lie with the State.[1]

---

[1] The State of Michigan's Petition seeks certiorari only with respect to the claims against CPC International, and not with respect to the claims against Aerojet and its subsidiaries. The State's Petition recognizes the reality that only CPC International, and not Aerojet, has a significant enough financial interest in the question to present the adversity necessary for proper presentation of the issue in this Court. Indeed, Aerojet's lack of a significant financial interest in the outcome of the claims against it may well lead this Court to deny the Petitions as moot insofar as they involve the claims against Aerojet. *Cf.* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, § 18.2 at 710 (7th ed. 1993) ("If the controversy becomes academic by reason of changed circumstances, the Court's jurisdiction ceases and the case becomes moot."); 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533.2, at 241 n. 28 (2d ed. 1984) (collecting cases in which relief granted by another tribunal mooted an action).

REASONS FOR DENYING THE PETITIONS

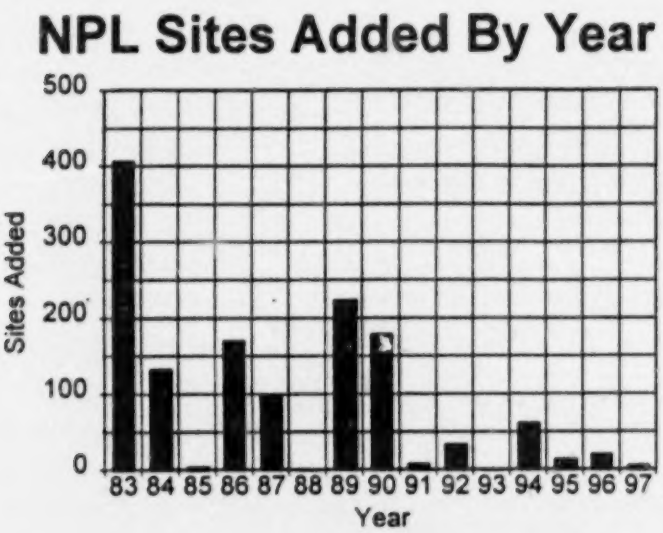
1. This case does not present a sufficiently important question of federal law to warrant the attention and resources of the Court. The appropriate standard for determining the liability of a parent corporation as an "operator" under § 107(a)(2) of CERCLA is not an issue likely to arise with great frequency in the federal courts in the future. As the Petitioner acknowledges, "the United States does not routinely seek to hold parent corporations liable for conditions at a subsidiary's facility." U.S. Pet. at 26-27. Indeed, the courts of appeals have noted that it is only in unusual cases that a parent corporation may be subjected to such liability. "[I]t is obviously not the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary." *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990); *see also Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993) (same). Moreover, the frequency of such cases will be further minimized as the overall number of CERCLA cases in the federal courts decreases along with a decrease in the number of Superfund sites.[2]

---

[2] The number of sites added annually to the National Priorities List ("NPL") has been steadily decreasing since the NPL's inception in 1983. From 1983-1990, the United States Environmental Protection Agency added an average of over 151 sites per year to the NPL. From 1991-1997, the annual average has declined to approximately 20. The following graph summarizes the annual data:

Even to the extent that such cases do continue to arise, existing decisions of the courts of appeals already provide a consistent answer to the abstract question presented by the Petitioners. The United States frames the question presented for review as "[w]hether a corporation that actively participated in, and exercised control over, the operations of a subsidiary may be held liable under CERCLA as an operator of the subsidiary's

---



See Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency, Pub. No. 9320.7-061, Supplementary Materials: National Priorities List, Proposed Rule and Final Rule 25-29 (April 1997); 62 Fed. Reg. 50,442 (1997) (adding six sites to NPL in September of 1997). The trend is likely to continue. *See e.g.*, 114 Cong. Rec. S11336-01 (1995) (remarks of Senator Bond) (noting that the EPA's budget is decreasing and that Superfund will take its share of the cuts and thus needs to prioritize among NPL sites); *see also* S.8, 105th Cong., 1st Sess. § 802 (1997) (pending Superfund reauthorization bill which would cap the number of new NPL sites, decreasing to no more than 10 per year after the year 2000).

facility." U.S. Pet. at (I). Respondents respectfully submit that a careful review of the court of appeals decisions cited by the United States (U.S. Pet. at 22-26) reveals that all the circuits would answer the abstract question presented in the affirmative.[3] It is true that the language and theory used to apply the abstract principle to the particular facts of a case may vary from circuit to

---

[3] The United States acknowledges this with respect to eight of the eleven circuits to address the issue. U.S. Pet. at 22-25 (citing holdings from the First, Second, Third and Eleventh Circuits and *dicta* from the Seventh, Eighth, Ninth and Tenth Circuits). In addition, the Sixth Circuit in this case recognized the validity of a direct theory of operator liability for parent corporations and specifically rejected the dissent's attempt to characterize the decision as holding otherwise. *See United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572, 579, 581 n. 5 (6th Cir. 1997) (*en banc*) (U.S. Pet App. 12a, 17a-18a). As the United States notes (U.S. Pet. at 25-26), it is not entirely clear how the Fifth Circuit would articulate its position on this point, but it is clear that the Fifth Circuit, like the other circuits, would impose CERCLA liability on a corporation whose active participation in and control over a subsidiary's operations was sufficient on the facts of a particular case to warrant disregard of the corporate form under applicable veil-piercing principles. Accordingly, the Fifth Circuit would also answer the question framed by the United States in the affirmative on the facts of an appropriate case. The Fourth Circuit, according to the United States, "has adopted a more expansive standard of operator liability," U.S. Pet. at 25, and so would obviously answer the abstract question framed by the United States in the affirmative. The District of Columbia Circuit has not addressed the issue and is unlikely to have the opportunity given the concentration of federally owned property and the absence of significant industrial property in the District. *See* 42 U.S.C. § 9613(b) (specifying venue for cost recovery actions in districts where the release of hazardous substances occurred or where the defendant resides, may be found, or has its principal office). There are no District of Columbia sites on the NPL. 40 C.F.R. § 300, Appendix B (1997).

circuit, but there does not appear to be any dispute among the circuits over the proposition that a company may under some circumstances bear liability for a subsidiary's facility.[4] This Court

---

[4] Contrary to the claim of the United States (U.S. Pet. at 25), the Fourth Circuit's decision in *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, *cert. denied*, 506 U.S. 940 (1992), does not deepen the claimed conflict among the circuits over the treatment of parent companies under CERCLA § 107(a)(2). *Nurad* does not even deal with the operator liability of parent companies under CERCLA. The relevant portion of *Nurad* deals with the alleged operator liability of former tenants of a contaminated site and former officers of the corporate owner. *Id.* at 842-844. Moreover, in *Nurad*, the Fourth Circuit declined to impose operator liability on the facts of the case under an "authority to control" test of operator liability. Accordingly, any dispute over whether the appropriate test was "authority to control" or "actual control" was academic since neither test supported a finding of liability. *See Nurad*, 966 F.2d at 842 (affirming summary judgment for the former tenant based on the absence of authority to control waste disposal, and further noting the district court finding that the former tenants "never actively participated in the disposal of hazardous substances at the site").

The only other Fourth Circuit decision to address any form of CERCLA operator liability is *United States v. Carolina Transformer Co., Inc.*, 978 F.2d 832 (1992), a case dealing with the liability of officers and directors of a corporate owner and operator. (One of the officers and directors was also the sole shareholder of the company, but the court declined to analyze liability on that basis. *Id.* at 836.) *Carolina Transformer* articulated its decision using an "authority to control" standard, *id.* at 836-837, but the facts found by the trial court and referenced by the Court of Appeals may well have supported the imposition of liability on other grounds. Both individual defendants admitted they were responsible for what happened at the site, and one actually admitted that he "operated or otherwise controlled operations" at the site. *Id.* at 837. The district court findings referenced by the Court of Appeals, *id.*,

should not spend its time as linguistic police requiring that the circuits rigidly adhere to a particular verbal formula.

The United States suggests that the *en banc* decision of the Sixth Circuit is out of step with other court of appeals decisions[5] in its focus on the traditional corporate law concept of derivative liability through veil-piercing as a basis for assigning liability to a parent corporation. But the Sixth Circuit expressly refused to reduce parent corporation liability under CERCLA to a veil-piercing question in every case. To the contrary, just like the decisions of other courts of appeals (*see* U.S. Pet. at 22-25), the Sixth Circuit recognizes the possibility of direct operator liability for a parent company. In fact, the Sixth Circuit specifically stated at two points in its opinion that a parent corporation can be held directly liable as an operator where it "actually" or "directly" operated the facility at issue, either independently of the subsidiary

---

detail more nefarious conduct including surreptitious operation of a subsidiary as a division of Carolina Transformer, a fraudulent attempt to divest Carolina Transformer of assets, and destruction of corporate records. *United States v. Carolina Transformer Co., Inc.*, 739 F. Supp. 1030, 1034-1035 (E.D.N.C. 1989). In such a case, the articulation of an "authority to control" standard was certainly not the controlling factor in the decision. Indeed, the United States says it does not support an "authority to control" standard, U.S. Pet. at 25, and so it would certainly not have brought the *Carolina Transformer* case in the absence of facts supporting liability on other grounds.

[5] U.S. Pet. at 22-25 (citing *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990); *Schiavone v. Pearce*, 79 F.3d 248 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth*, 996 F.2d 1107 (11th Cir. 1993)).

or as an actual co-operator alongside the subsidiary. *United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572, 579, 581 (6th Cir. 1997) (*en banc*) (U.S. Pet. App. 12a, 17a-18a). Moreover, the court's majority took the dissent to task for suggesting that it was holding otherwise, stating that "the dissent's characterization of our opinion as holding 'that a parent cannot, as a matter of law, be held directly liable under 42 U.S.C. § 9607(a)(2) as an "operator" of a facility owned by its subsidiary corporation' is mistaken." *Id.* at 581 n.5 (U.S. Pet. App. 17a). The Sixth Circuit simply did not find such a direct liability theory implicated by the claims and facts of this particular case. *Id.* This Court should not spend its time poring over a particular factual application of accepted legal principles.

In any event, the distinction Petitioner attempts to create between a standard based upon derivative liability through veil-piercing and one of direct liability is more theoretical than real. Commentators who have compared cases relying upon the traditional veil-piercing criteria with those purporting to apply a direct liability standard have found no difference in the result of the cases based upon this difference in approach. "[T]he liability of a parent corporation is the same regardless of whether liability is premised on traditional corporate law or direct statutory liability under CERCLA." Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 Nw. U. L. Rev. 259, 315 (1992); *see also* George W. Dent, *Limited Liability and Environmental Law*, 26 Wake Forest L. Rev. 151, 160 (1991) ("In theory, [direct liability] differs from liability under piercing . . . . In practice, however, the two can be hard to distinguish. The kind of participation in a CERCLA violation necessary to establish direct liability may differ little from the kind of involvement in the subsidiary's affairs

necessary to pierce the veil"). According to the commentators, "careful analysis of the fact patterns of these cases [purporting to apply a distinctly federal, direct liability standard] discloses that courts have simply held liable parties that could have been held liable under traditional corporate law doctrine." Oswald & Schipani, *supra*, at 236. Respondents respectfully submit that this Court should not devote its time to resolving an abstract question that has no real impact on the outcome of actual cases.

Because the question presented for review by the Petitioners is not frequently recurring in nature, because all the courts of appeal, including the Sixth Circuit, recognize the potential for both direct and derivative theories of liability,[6] and because the apparent difference between the direct and derivative standard of liability is of little practical import, this case does not warrant the attention and resources of this Court. Accordingly, the petitions should be denied.

2. Even if this Court decides to address the question presented by the Petitioners, it should do so only with respect to CPC International and not with respect to Aerojet. First, in Aerojet's case, unlike the case against CPC, resolution of the question presented in favor of the Petitioner should not change the outcome in favor of Aerojet. Even if Aerojet is deemed an "operator" under CERCLA § 107(a)(2), the judgment in favor of

---

[6] The Fifth Circuit focused solely on derivative liability of a parent corporation through veil-piercing in *Joslyn v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), but that court has more recently recognized the potential for both direct and derivative liability in the analogous case of a majority shareholder. *See Riverside Market Development Corp. v. International Building Products, Inc.*, 931 F.2d 327 (5th Cir. 1991).

Aerojet should still be sustained on other grounds. Moreover, even if Aerojet were ultimately found liable, the State of Michigan, and not Aerojet, would bear the ultimate financial burden of the ruling. *Cordova Chemical Co. v. Department of Natural Resources,* 212 Mich. App. 144, 536 N.W.2d 860 (1995). This dilutes the adversarial nature of the case against Aerojet necessary for careful adjudication of the issues. This also means that the taxpayers will bear financial responsibility for any liability ultimately imposed on Aerojet and its subsidiaries—precisely the result the United States says it seeks to avoid in bringing its Petition. U.S. Pet. at 27. Accordingly, a grant of certiorari in this case on the claims against Aerojet would not be an effective use of this Court's resources.

a. Aerojet has consistently argued that it cannot be liable under § 107(a)(2), regardless of whether it is deemed an "operator," because no disposal of hazardous substances occurred at the site during the tenure of its subsidiaries. Section 107(a)(2) imposes liability only on owners or operators "at the time of disposal of any hazardous substance." 42 U.S.C. § 9607(a)(2). Petitioners have asserted that the passive migration in groundwater of contaminants left by others amounts to "disposal." The Sixth Circuit did not have to address this issue because it held that Aerojet was not an operator.

Two courts of appeals have recently ruled, consistent with Aerojet's position, that passive migration is not "disposal" under CERCLA. *See ABB Industrial Systems Inc. v. Prime Technology, Inc.*, 120 F.3d 351 (2d Cir. 1997); *United States v CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996). The Second Circuit succinctly summarized the numerous factors that support such a conclusion:

First, disposal is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing" of hazardous chemicals so that they may enter the environment. 42 U.S.C. § 6903(3). None of these terms is commonly used to refer to the gradual spreading of hazardous chemicals already in the ground. *CDMG Realty Co.*, 96 F.3d at 714.

Second, current owners are liable, if, *inter alia*, there has been a "release" of hazardous substances. 42 U.S.C. § 9607(a). Unlike the definition of disposal, release is defined to include "leaching," *id.* § 9601(22), which is commonly used to describe passive migration, see *CDMG Realty Co.*, 96 F.3d at 715 & n.4 (quoting several law journals and cases). That Congress used the term leaching in the definition of release demonstrates that Congress knew that passive migration occurred but decided not to impose liability for it on prior owners. *Id.*

Third, CERCLA provides an "innocent owner" defense. *See* 42 U.S.C. §§ 9607(b)(3), 9601(35); *Westwood Pharmaceutical v. National Fuel Gas Dist. Corp.*, 964 F.2d 85, 89-91 (2d Cir. 1992). To qualify for that defense, a defendant must establish, *inter alia*, that it acquired the site "after the disposal" of hazardous chemicals. 42 U.S.C. § 9601(35)(A). If "disposal" included the gradual spreading of hazardous chemicals spilled before the defendant acquired the site, the innocent owners defense would hardly ever be available. *CDMG Realty Co.*, 96 F.3d at 716. Once hazardous chemicals are in the ground, they usually

> spread, and therefore, there would almost never be an identifiable period "after the disposal." *Id.* Congress would not intentionally create a useless defense. Thus, we interpret the word "disposal" as limited to spilling, discharging, leaking, etc., and not to passive migration. *See Id.*
>
> . . . .
>
> Finally, the *CDMG Realty Co.* Court reasoned that its interpretation was consistent with CERCLA policy. One of CERCLA's goals is to "force polluters to pay the cost associated with their pollution." *CDMG Realty Co.*, 96 F.3d at 717; *see also B.F. Goodrich*, 99 F.3d at 514 (CERCLA's purposes include "assuring that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions"). If a person merely controlled a site on which hazardous chemicals have spread without that person's fault, that person is not a polluter and is not one upon whom CERCLA aims to impose liability.

ABB, 120 F.3d at 358-59; *see also* Note, *The Case Against Intermediate Owner Liability Under CERCLA for Passive Migration of Hazardous Waste*, 93 Mich. L. Rev. 609 (1994).[7] Accordingly,

---

[7] *But cf. Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992) (leaking from tanks that were deposited prior to the defendant's ownership constitutes "disposal" subjecting the defendant to CERCLA liability). *Nurad* did not address precisely the same question presented by the facts of this case. In *Nurad*, additional contaminants entered the environment from leaking containers. 966 F.2d at 846 (former owners held property "at a time when the mineral spirits were 'leaking' from the tanks"). In this case, all of the contaminants at issue were

even if the Sixth Circuit's "operator" analysis were reversed and Aerojet were deemed to be an operator, no liability would attach to Aerojet since the passive migration of contaminants left by others does not constitute disposal within the meaning of the statute.

b. Even if the operator liability and disposal issues were resolved against Aerojet, it would still not be subject to liability because Aerojet and its subsidiaries qualify for the third party defense available under § 107(b)(3) of CERCLA for parties that neither caused the contamination nor had a disqualifying contractual relationship with those who did. Section 107(b)(3) provides that:

> (b) There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by
>
> . . .
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned,

---

already in the soil and groundwater of the site before Aerojet's subsidiary acquired the property in 1977. The question, then, is whether natural migration of contaminants already released into the environment amounts to new "disposal." As the Second Circuit noted in *ABB*, such a broad reading of the term would effectively eliminate other provisions in the statute.

> taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .

42 U.S.C. § 9607(b). Aerojet and its subsidiaries meet each of the requirements of this defense because Aerojet and its subsidiaries (1) did not cause contamination at the site; (2) did not have a disqualifying contractual relationship with those who did; and (3) did conduct themselves reasonably at the site consistent with the Stipulation and Consent Order with the State of Michigan. The Sixth Circuit has instructed the trial court to reconsider the applicability of this defense on remand. *United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572, 583 (6th Cir. 1997) (*en banc*) (U.S. Pet. App. 23a-24a). Accordingly, even if all other issues were resolved adversely to Aerojet, the judgment of the Sixth Circuit in favor of Aerojet should still stand.

c. Petitioner asserts that an important purpose of CERCLA is to relieve the taxpaying public of the burden of bearing cleanup costs at polluted sites. Indeed, Petitioner asserts that "this case illustrates precisely why" parent corporations should be subject to liability as operators in some cases—to avoid situations in which "the general public must assume the costs of cleanup." U.S. Pet. at 27. But the facts of this case belie such a characterization as to Aerojet because a taxpaying public will ultimately bear the cost even if Aerojet is deemed liable. The Michigan Court of Appeals has ruled that the State of Michigan must reimburse Aerojet and its subsidiaries for any CERCLA liability they incur. *Cordova Chemical Co. v. Department of Natural Resources*, 212 Mich. App.

144, 536 N.W. 2d 862 (1995), *lv. denied*, 453 Mich. 899, 554 N.W.2d 319 (1996). Thus, it is taxpayers who will bear ultimate financial responsibility for any liability assigned to Aerojet and its subsidiaries. As such, review by this Court of the claims against Aerojet cannot advance the very policy Petitioner claims to advance with its Petition.

3. This Court should in any event deny the Conditional Cross-Petition of CPC International because CPC has no proper interest in seeking review of a judgment in favor of Aerojet and against the State of Michigan that the State itself is content to accept. A party must generally assert only its own legal rights, not those of other parties. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1981); *Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). A party must also have a sufficient personal stake in the outcome of a controversy to warrant its invocation of the Court's jurisdiction. *See Warth v. Seldin*, 422 U.S. 490 (1975). CPC's only asserted interest in seeking review of this issue as to Aerojet is to advance its claim for contribution against Aerojet. But CPC chose to abandon that claim in this litigation based on a partial settlement with Aerojet. *See* Stipulation and Order (April 15, 1992) at ¶ 6, Mich. Pet. App. 83a ("Since Aerojet-General Corp. and CPC International Inc. have reached a voluntary settlement that allocates past response costs between them, this Stipulation and Order constitutes a disposition of all legal and factual issues before the Court in phase II of the consolidated action."). Accordingly, the district court dismissed all claims between CPC and Aerojet in this case without prejudice. *See* Final Judgment (September 10, 1992) at ¶ 8 (Mich. Pet. App. 80a-81a). CPC may now regret its earlier decision to abandon its contribution claims in this case, but that regret does not create a proper basis for this Court to review a

judgment between Aerojet and the State of Michigan that both Aerojet and the State are content to accept.

CONCLUSION

The Petition for Writ of Certiorari filed by the United States (No. 97-454) should be denied. Alternatively, even if the Court decides to grant this petition, it should do so only with respect to the claims against CPC. The Court should further deny the Conditional Cross-Petition of CPC (No. 97-464).[8]

November 10, 1997

Respectfully submitted,

John D. Tully
John V. Byl
Robert J. Jonker
Dean F. Pacific

WARNER NORCROSS & JUDD LLP
900 Old Kent Building
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
Telephone: (616) 752-2000
Attorneys for Aerojet-General Corporation, Cordova Chemical Company of Michigan and Cordova Chemical Company

---

[8] No relief is sought against Aerojet or its subsidiaries in the Petition of MDNR (No. 97-296).

José N. Uranga
Senior Counsel - Environmental Law
Aerojet-General Corporation
P. O. Box 13222
Sacramento, California 95813-6000
Co-Counsel for Aerojet-General Corporation,
Cordova Chemical Company of Michigan and
Cordova Chemical Company

Doc #254560-1110971207

(4) / (3)

Supreme Court, U.S.
FILED
NOV 12 1997
CLERK

No. 97-296 and 97-464

In the Supreme Court of the United States

OCTOBER TERM, 1997

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

CPC INTERNATIONAL, INC., CROSS-PETITIONER

v.

AEROJET-GENERAL CORPORATION, ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15 pp

QUESTIONS PRESENTED

1. Whether a parent corporation can be held directly liable under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607(a)(2), as an operator of its wholly-owned subsidiary's facility, based on the parent corporation's own actions in directing the operation of the facility at the time of disposal of hazardous substances (Question Presented in No. 97-296).

2. Whether, if the Court grants the petition for a writ of certiorari in No. 97-296, it should also review the Sixth Circuit's holding that Aerojet-General is not liable as an "operator" (Question Presented in No. 97-464).

TABLE OF CONTENTS

	Page
Statement	1
Argument	3
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Cordova Chemical Co. v. *MDNR*, 536 N.W.2d 860 (Mich. Ct. App. 1995), appeal denied, 554 N.W.2d 319 (Mich. 1996)	7-8
Ohio v. *EPA*, 997 F.2d 1520 (D.C. Cir. 1993)	5
United States v. *Charter Int'l Oil Co.*, 83 F.3d 510 (1st Cir. 1996)	10
United States v. *Cordova Chemical Co.*, 113 F.3d 572 (1997)	2
United States v. *CPC, Int'l, Inc.*, petition for cert. pending, No. 97-454 (filed Sept. 10, 1997)	2, 3, 8
United States v. *Hercules, Inc.*, 961 F.2d 796 (8th Cir. 1992)	10

Statutes, regulations and rule:

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.*:	
§ 101(11), 42 U.S.C. 9601(11)	4
§ 104, 42 U.S.C. 9604	3, 4
§ 104(c), 42 U.S.C. 9604(c)	6
§ 104(c)(3), 42 U.S.C. 9604(c)(3)	4, 5
§ 104(c)(6), 42 U.S.C. 9604(c)(6)	5
§ 106, 42 U.S.C. 9606	3
§ 107, 42 U.S.C. 9607	4, 6
§ 107(a), 42 U.S.C. 9607(a)	2
§ 107(a)(2), 42 U.S.C. 9607(a)(2)	7, 8
§ 107(a)(3), 42 U.S.C. 9607(a)(3)	7
§ 113(f)(1), 42 U.S.C. 9613(f)(1)	8
§ 113(f)(2), 42 U.S.C. 9613(f)(2)	10
§ 122(d)(2)(B), 42 U.S.C. 9622(d)(2)(B)	10

Statutes, regulations and rule—Continued: Page

Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 104(i), 100 Stat. 1620 5
26 U.S.C. 9507 4
28 C.F.R. 50.7 10
40 C.F.R.:
Section 300.435(f) 5
Section 300.435(f)(3) 5, 6
Section 300.510 5
Sup. Ct. R. 12.6 9

Miscellaneous:

H.R. Rep. No. 253, 99th Cong., 1st Sess. (1985) 5, 10

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-296

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

No. 97-464

CPC INTERNATIONAL, INC., CROSS-PETITIONER

v.

AEROJET-GENERAL CORPORATION, ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT

The Michigan Department of Environmental Quality (MDEQ) seeks review of a decision of the United States Court of Appeals for the Sixth Circuit in

United States v. *Cordova Chemical Co.*, 113 F.3d 572 (1997) (en banc). See 97-296 Pet. App. 1a-42a. The decision holds, among other things, that two corporations, CPC International, Inc. (CPC), and Aerojet-General Corporation (Aerojet), are not liable to the United States and the MDEQ, under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607(a), for the governments' expenses in responding to releases of hazardous substances from a facility located near Muskegon, Michigan. The United States has also filed a petition for a writ of certiorari seeking review of that decision. *United States* v. *CPC, Int'l, Inc.*, petition for cert. pending, No. 97-454 (filed Sept. 10, 1997). The United States' petition sets forth the facts and procedural history of the case in the lower courts. See 97-454 Pet. 3-14.

The United States and the MDEQ have raised the same issue in their respective petitions for a writ of certiorari. Each urges that the court of appeals erred in ruling that a parent corporation that actively participates in, and exercises control over, a wholly-owned subsidiary's facility does not qualify as an "operator" of the facility. Compare 97-454 Pet. I, 15-21, with 97-296 Pet. i, 8-19. The petitions differ, however, in that the United States seeks relief against both CPC and Aerojet, while the MDEQ seeks relief only against CPC. Compare 97-454 Pet. II, 20-21, with 97-296 Pet. ii, 4. The MDEQ's decision to seek relief against only one of the companies has prompted CPC to file a conditional cross-petition urging that, if the Court grants the MDEQ's petition, it should review Aerojet's liability as well. See 97-464 Pet. i, 4-7.

ARGUMENT

The United States submits this brief to explain our understanding of the relationship between the United States' petition for a writ of certiorari, the MDEQ's petition for a writ of certiorari, and CPC's conditional cross-petition. As described below, the United States and the MDEQ each have important and complementary interests in the issue presented by their petitions, but, as a consequence of CERCLA's statutory provisions and the facts of this particular case, their interests are not entirely congruent. The United States and the MDEQ agree on the question of law at issue here. The United States suggests, however, as a matter of sound procedure, that the Court should hold the MDEQ's petition and CPC's conditional cross-petition pending the Court's disposition of the United States' petition in No. 97-454, which places before the Court all of the relevant parties and all of the relevant claims.

1. As noted in the United States' petition (97-454 Pet. 3-6), Congress enacted CERCLA to create a comprehensive federal program for addressing the national problem posed by decades of improper disposal of hazardous substances. CERCLA authorizes the United States to undertake direct response actions to protect the public from the release and threatened release of hazardous substances. See CERCLA § 104, 42 U.S.C. 9604. CERCLA also grants the United States authority to issue orders and to seek injunctive relief to compel persons to respond to releases, or threats of release of those substances. See CERCLA § 106, 42 U.S.C. 9606.

CERCLA provides a mechanism for financing government-initiated cleanups of hazardous waste

sites and recovering those costs from the responsible parties. Upon satisfying statutory conditions, the United States may use the "Hazardous Substance Superfund" as the initial source of funding for federal response actions. See CERCLA §§ 101(11), 104, 42 U.S.C. 9601(11), 9604; 26 U.S.C. 9507. The United States may then bring judicial actions against responsible parties under Section 107 of CERCLA to recover the government's response costs and replenish the Superfund. 42 U.S.C. 9607.

The individual States have a significant role in federally-financed cleanups. Of particular relevance here, Section 104(c)(3) of CERCLA requires each State to provide cost-sharing and other assurances before any Superfund-financed remedial action may take place. Section 104(c)(3) provides in relevant part:

> The President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that (A) the State will assure all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President * * * and (C) the State will pay or assure payment of (i) 10 per centum of the costs of the remedial action, including all future maintenance [or (ii) 50 percent or more in circumstances where the State operated the facility at which the release occurred].

42 U.S.C. 9604(c)(3). In other words, the State is responsible for (1) paying 10 percent of the costs of a Superfund-financed "remedial action" at a facility that has not been operated by the State, and (2) fully

funding the costs of "maintenance" of the remedial action under CERCLA. See 40 C.F.R. 300.435(f), 300.510; see also *Ohio* v. *EPA*, 997 F.2d 1520, 1543-1545 (D.C. Cir. 1993).

Section 104(c)(6) of CERCLA provides that, for purposes of subsection (c)(3) cost share and maintenance responsibilities, treatment measures necessary to restore ground or surface water quality shall be considered "remedial action," rather than "operation and maintenance," for a period of up to ten years after commencement of operations, or until the ground or surface water quality is restored to a level that ensures protection of human health and the environment.[1] 42 U.S.C. 9604(c)(6); see 40 C.F.R. 300.435(f)(3). Consequently, for groundwater treatment remedies (such as the one being implemented at the "Muskegon" site), the United States contributes 90 percent of the funding for the operation and maintenance of the groundwater treatment remedy, and the State contributes the remaining 10 percent of the funding, for up to ten years after the remedy becomes operational. Thereafter, the State pays the full maintenance costs for the groundwater treatment measure.

2. The United States has incurred the bulk of the response costs to date for cleaning up the hazardous conditions at the Muskegon site. Nevertheless, the MDEQ (which was formerly known as the Michigan Department of Natural Resources (MDNR)), has also

---

[1] The Section 104(c)(6) provisions were added to CERCLA through the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 104(i), 100 Stat. 1620; see also H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 1, at 60, 70 (1985); *Ohio* v. *EPA*, 997 F.2d at 1544.

incurred significant response costs at the site. See, *e.g.*, 97-296 Pet. App. 82a-83a (stipulation and order entered in April 1992 by the district court indicating that the MDNR had incurred $1.65 million in past response costs); see also 97-296 Pet. App. 80a. Both the United States and the MDEQ will also incur future response costs at the Muskegon site.

Most significantly, the MDEQ will be obligated to pay its statutory cost-share of implementing the groundwater treatment measure at the site. The EPA has not yet declared the groundwater treatment remedy "operational and functional." See 40 C.F.R. 300.435(f)(3). Once it does so, Section 104(c) of CERCLA will require the MDEQ to pay 10 percent of the operation costs for up to ten years and to pay the full costs of operation and maintenance in the ensuing years. 42 U.S.C. 9604(c). The EPA currently estimates that the long-term operation of that remedy will last approximately 30 years and, therefore, that the present value of the MDEQ's financial commitment at this site is likely to be substantial.

3. Section 107 of CERCLA provides that the United States, as well as a State, may recover response costs from the parties that Congress has deemed liable under the statute. See CERCLA § 107, 42 U.S.C. 9607. In the instant case, the United States filed a cost recovery action under Section 107 of CERCLA to recover its response costs at the Muskegon site against CPC, Aerojet, Aerojet's subsidiaries, Cordova Chemical Company (Cordova/California) and Cordova Chemical Company of Michigan (Cordova/Michigan), and Arnold Ott. See 97-296 Pet. 5. The MDEQ initially was drawn into this dispute because CPC and Aerojet filed contribution actions against the MDNR. The MDNR later filed a counter-

claim against CPC and a cross-claim against Aerojet and the Cordova subsidiaries for cost recovery and contribution. *Ibid.*[2]

The MDEQ also has an unusual financial interest in the instant cost-recovery action against CPC and Aerojet that arises from the pre-litigation history of the Muskegon site. In 1977, Aerojet's subsidiary, Cordova/California, purchased the site and also entered into an agreement with the MDNR under which Cordova/California agreed to undertake certain clean-up actions, the MDNR agreed to share in the funding of those actions, and the MDNR agreed to indemnify Cordova/California for other expenses. 97-296 Pet. App. 105a-112a. The Michigan state courts have held that because of that agreement, the MDNR must indemnify Aerojet and its Cordova subsidiaries against any CERCLA liability that they may incur at the Muskegon site. See *Cordova Chemical Co.* v.

---

[2] CPC actually initiated the legal actions by filing contribution actions in anticipation of the United States' suit. See 97-296 Pet. 4-5. CPC sued not only the MDNR, but also Aerojet, the Cordova subsidiaries and ultimately CPC's insurer, while Aerojet and the Cordova subsidiaries filed claims against CPC. 97-296 Pet. 5. The district court, which consolidated the actions for resolution in three phases (liability, remedy, and insurance coverage, 97-296 Pet. App. 139a-140a), has not resolved any of the contribution claims brought by the companies against each other. *Ibid.*; see *id.* at 81a. The district court dismissed contribution claims brought by CPC and Aerojet against the MDNR under CERCLA, holding that the MDNR was not liable as an operator under Section 107(a)(2) or as an arranger for disposal of hazardous waste under Section 107(a)(3). See 97-296 Pet. App. 127a-131a, 138a. The court of appeals affirmed the district court's decision regarding arranger liability, the only claim against the MDNR that was appealed. See *id.* at 13a-14a.

MDNR, 536 N.W.2d 860 (Mich. Ct. App. 1995), appeal denied, 554 N.W.2d 319 (Mich. 1996) (Table).

The MDEQ's petition indicates that the MDEQ does not seek relief against Aerojet, but seeks review of only that portion of the court of appeals' judgment pertaining to the liability of CPC as an operator of the Muskegon site under Section 107(a)(2) of CERCLA. See 97-296 Pet. ii, 4. As CPC's conditional cross-petition suggests, the MDEQ appears to have limited its requested relief in that way to avoid subjecting itself to potential liability as Aerojet's indemnitor. See 97-464 Pet. 5 & n.4. The United States, by contrast, has sought relief against both CPC and Aerojet because, in the United States' view, they are both directly liable as "operators" under CERCLA.[3] See 97-454 Pet. 20-21.

4. As the foregoing discussion indicates, the United States has the predominant interest in the outcome of this case under the CERCLA framework, but the MDEQ also has substantial interests under CERCLA. The MDEQ's position in this case appears to be affected, however, by its potential financial obligations under an indemnity agreement with one of the respondents, which has prompted CPC to file its conditional cross-petition. The United States sub-

---

[3] This does not mean, of course, that they ultimately would be subject to the same monetary assessment for the conditions at the Muskegon site. Under CERCLA's statutory contribution provisions, if CPC and Aerojet are found to be jointly and severally liable, they would be entitled as a matter of contribution to obtain an equitable allocation of their respective shares of the response costs. See CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.").

mits that, if (as we urge) the Court decides to grant review in this case, it can most effectively accommodate the various interests of the parties by holding the MDEQ's petition and CPC's cross-petition until the Court resolves the issue set out in the United States' petition for writ of certiorari. That procedure would place all of the relevant parties and claims before the Court.

The United States' petition and the MDEQ's petition present an identical legal question for the Court's review. They differ only in that the United States seeks reversal of the court of appeals' judgment with respect to both CPC and Aerojet, while the MDEQ seeks reversal solely with respect to CPC. Hence, the MDEQ could pursue its specific claim against CPC as a respondent supporting the United States' position under Rule 12.6 of the Rules of this Court, while the MDEQ's own petition remains pending for appropriate relief should that position prevail. At the same time, the United States' request for relief against both CPC and Aerojet would also satisfy CPC's concern that the Court also consider the potential liability of Aerojet. Because the United States' petition effectively places all of the relevant parties and issues before the Court, there is no need to follow the procedurally cumbersome course of granting two petitions and a conditional cross-petition to achieve the same result.[4]

---

[4] In light of CPC's concerns about its liability vis-à-vis Aerojet, we note that the United States had settlement discussions with the MDEQ and Aerojet before filing its petition in this case, and those discussions are likely to continue. The United States is, of course, receptive to resolving the liability of potentially responsible parties through settlement on reasonable terms and in accordance with the provisions of

CERCLA. Under CERCLA's provisions, such settlements affect the rights of other parties to contribution from the settling parties. See CERCLA § 113(f)(2), 42 U.S.C. 9613(f)(2). In the event that the United States, the MDEQ, and Aerojet should ultimately reach agreement respecting Aerojet's liability, the proposed settlement agreement would be formalized in a proposed consent decree that would be subject to public notice and comment before receiving final approval. See CERCLA § 122(d)(2)(B), 42 U.S.C. 9622(d)(2)(B); 28 C.F.R. 50.7.

Under the United States' standard practice in CERCLA cases, a proposed consent decree is lodged in the district court in which the action is pending, and the United States publishes a notice of the proposed consent decree in the Federal Register. Persons who are not parties to the proposed consent decree are given at least 30 days before its entry as a final judgment to provide comments. The United States considers, and files with the court, all such comments, and the United States may withhold its consent to the proposed decree if the comments "disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate." CERCLA § 122(d)(2)(B), 42 U.S.C. 9622(d)(2)(B); see 28 C.F.R. 50.7. Furthermore, in approving a consent decree, a district court must determine that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve. See, *e.g.*, *United States* v. *Charter Int'l Oil Co.*, 83 F.3d 510, 515 (1st Cir. 1996); *United States* v. *Hercules, Inc.*, 961 F.2d 796, 800 (8th Cir. 1992); see also H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 3, at 19 (1985).

Hence, in the event that settlement discussions resume while this case is pending before the Court and an agreement is reached, CPC would have a full opportunity to comment on the proposed terms and raise objections before the agreement is entered as a final consent decree.

CONCLUSION

The petition for a writ of certiorari in No. 97-296 and the conditional cross-petition in No. 97-464 should be held and disposed of in accordance with this Court's disposition of the United States' petition for a writ of certiorari in No. 97-454.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 1997

(4)

No. 97-464

Supreme Court, U.S.
FILED
NOV 25 1997
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

CPC INTERNATIONAL INC., PETITIONER

v.

AEROJET-GENERAL CORPORATION,
ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE CONDITIONAL CROSS-PETITIONER

J. MICHAEL SMITH
Miller, Johnson, Snell & Cummiskey, P.L.C.
800 Calder Plaza Building
250 Monroe, NW
Grand Rapids, MI 49503
(616) 831-1700

KENNETH S. GELLER*
DONALD M. FALK
Mayer, Brown & Platt
2000 Pennsylvania Ave. NW
Washington, DC 20006
(202) 463-2000

* *Counsel of Record*

18P

TABLE OF AUTHORITIES

Page

Cases:

Atherton v. *FDIC*, 117 S. Ct. 666 (1997) 1

CPC International, Inc. v. *Aerojet-General Corp.*, No. 1:94-CV-432 (W.D. Mich.) 3-4

Donahey v. *Bogle*, No. 92-1128, 1997 WL 710017 (6th Cir. Nov. 17, 1997) (en banc) 2-3

Donahey v. *Livingstone*, No. 93-646, cert. denied, 510 U.S. 1024 (1993) 3

Livingstone v. *Donahey*, No. 93-428, cert. granted, vacated and remanded, 512 U.S. 1201 (1994) 3

O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994) 2

United States v. *Texas*, 507 U.S. 529 (1993) 2

Miscellaneous:

Break in Superfund Stalemate May Lead to Action Next Year, CQ MONITOR, Nov. 14, 1997, at 8 3

REPLY BRIEF FOR THE CONDITIONAL CROSS-PETITIONER

The responsive briefs amply demonstrate that the petitions in Nos. 97-296 and 97-454 should be denied. Moreover, the Brief for the United States suggests that, if the petitions were granted, the case might well be dismissed either as improvidently granted or as moot. Neither of the briefs advances any sound reason to deny the conditional cross-petition.

1. In its brief, the United States identifies yet another reason why this case presents an especially poor candidate for this Court's attention. The United States raises the possibility (Br. 9 n.4) that the action — or significant parts of it — may be settled before this Court could resolve the questions presented.[1] In so many words, the United States concedes that this Court's resources may well be misdirected if this case comes before it.

Moreover, the United States less than three weeks ago filed a Brief in Opposition to the petition in No. 97-241 — a petition that asserts a conflict among the circuits with respect to the more commonly recurring issue of successor liability under CERCLA — that identifies an additional reason why the petitions in this case "have overstated the need for immediate resolution of the question." No. 97-241, U.S. Br. in Opp. 18. In that brief, the United States argues that a grant of certiorari is premature because the courts of appeals have not yet had an opportunity to consider whether court-made federal rules of liability under CERCLA are appropriate in light of this Court's instructions to the contrary in several recent cases. See *id.* at 18-19 (citing *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997), and

---

[1] Although the United States hints only at the possibility of a sweetheart settlement among the government petitioners and MDNR's indemnitee, Aerojet, we note that the long history of actual settlement discussions in this case has included CPC. To the extent that the United States is trying to shelter MDNR from the potential effects of the petition of the United States, such machinations reinforce the inappropriateness of this case for further review.

O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994)). See also *United States* v. *Texas*, 507 U.S. 529, 534 (1993); CPC Br. in Opp. 15-18.

The United States' argument in No. 97-241 flatly contradicts the position it asserts in seeking certiorari here. Since this Court in *Atherton*, *O'Melveny*, and *Texas* clarified the strong presumption against judicial displacement of state-law liability rules in the absence of a clear statutory command, *no* court of appeals has affirmed a final judgment of liability under CERCLA against a parent corporation based on the *ad hoc* federal standard advanced by petitioners. The few courts that have stated federal standards in interlocutory decisions or in dicta have not even acknowledged this Court's decisions in *Atherton*, *O'Melveny*, or *Texas*. The United States cannot have it both ways: as it correctly explains in No. 97-241, this Court should permit the courts of appeals to apply this Court's recent statement of the controlling jurisprudence to CERCLA "operator" liability before deciding whether it must itself address the issue.

The brief for Aerojet-General Corporation and its subsidiaries (collectively "Aerojet") additionally confirms that the issue presented in the petitions, concededly of sporadic significance and declining in importance, does not warrant further review. As Aerojet notes, all of the courts of appeals agree that a parent corporation or other shareholder may be liable as an "operator" either through direct activity at a "facility" or as a result of corporate veil-piercing. As Aerojet's analysis confirms, no court of appeals has held a parent corporation liable as an operator of its subsidiary's facility based on an intracorporate relationship resembling that of CPC and Ott II.

Although no further review of the question presented is warranted at all, to grant review in a convoluted and fact-specific case of uncertain status would be especially imprudent in light of the clear opportunity to review identical, but broader issues in a simpler case arising from the same court. The Sixth Circuit now has decided *Donahey* v. *Bogle*, No. 92-1128, 1997

WL 710017 (Nov. 17, 1997), which was argued *en banc* the same day as the present case. The analysis of the Sixth Circuit in *Donahey* was identical to its analysis here, the facts are essentially undisputed, the alignment of parties is simpler, and both parties brought that case before this Court at an earlier stage. *Donahey* v. *Livingstone*, No. 93-646, cert. denied, 510 U.S. 1024 (1993); *Livingstone* v. *Donahey*, No. 93-428, cert. granted, vacated and remanded, 512 U.S. 1201 (1994).

The defendant in *Donahey* not only was sole shareholder of the "operator" corporation, but also was its treasurer and chairman of its board of directors. 1997 WL 710017, at *1. Review of *Donahey* thus would allow this Court to address not only shareholder liability, but also the personal liability of officers and directors of "operators." If there is any reason to review the Sixth Circuit's handling of "operator" liability in light of continuing congressional interest in providing legislative solutions for perceived failures in CERCLA, see *Break in Superfund Stalemate May Lead to Action Next Year*, CQ MONITOR, Nov. 14, 1997, at 8 (reporting "comprehensive bipartisan measure to overhaul" CERCLA), *Donahey* would provide a far more appropriate vehicle than this case.

2. Aerojet also advances two reasons why, it says, it should not be included as a respondent. Neither warrants consideration. First, Aerojet suggests (Br. 17) that CPC lacks "a sufficient personal stake in the outcome" of the case against Aerojet. For reasons explained in the conditional cross-petition (at 4-7), the suggestion is frivolous. Aerojet's assertion (Br. 17) that CPC has "abandon[ed]" its claim against Aerojet is simply false. Aerojet notes that the parties' contribution claims were dismissed, by stipulation and without prejudice, in the district court. As Aerojet is well aware, but as it conceals from this Court, the parties refiled their contribution claims in a separate action *in the same district court*. See *CPC International Inc.* v. *Aerojet-General Corp.*, No. 1:94-CV-432 (W.D. Mich.). Those claims include Aerojet's own contribution claim against CPC. See *id.*, Answer, Affirmative Defenses, Counterclaim and

Cross-Claim of Aerojet-General Corp. *et al.* (filed June 30, 1994).

Even within the four corners of this action, however, the imposition of joint and several liability renders CPC adverse to Aerojet. If CPC were held to be a responsible party for the Muskegon site, but Aerojet were permitted to avoid liability because this Court denied all review as to Aerojet, CPC might have to pay all response costs. If, by contrast, Aerojet also were held to be a responsible party, the total costs would be apportioned between CPC and Aerojet.

For related reasons, Aerojet's second argument for exclusion from any grant of certiorari is equally unsound. Contrary to Aerojet's assertion (Br. 12, 16-17), MDNR's obligation to indemnify Aerojet does not make Aerojet's inclusion in any prolongation of this litigation less appropriate. If CPC and Aerojet both were held responsible, the total response costs would be apportioned between CPC and Aerojet. MDNR's status as Aerojet's indemnitor is the result of MDNR's bargain under Michigan law and does not affect the calculus under CERCLA. If CPC alone were held responsible because this Court denied review, MDNR would evade its indemnity obligation and CPC would be left holding the bag. MDNR should not be permitted to orchestrate its own release from liability.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be granted if the Court grants the petition in No. 97-296.

Respectfully submitted.

J. MICHAEL SMITH
Miller, Johnson, Snell & Cummiskey, P.L.C.
800 Caider Plaza Building
250 Monroe, NW
Grand Rapids, MI 49503
(616) 831-1700

KENNETH S. GELLER*
DONALD M. FALK
Mayer, Brown & Platt
2000 Pennsylvania Ave. NW
Washington, DC 20006
(202) 463-2000

* *Counsel of Record*

NOVEMBER 1997

(5) (7) (6)

Nos. 97-296, 97-454 and 97-464

Supreme Court, U.S.
FILED
DEC 10 1997
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

UNITED STATES OF AMERICA (#97-454) and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY (# 97-296),
Petitioners
v.
CPC INTERNATIONAL, INC., et al.
Respondents
and
CPC INTERNATIONAL, INC. (# 97-464),
Cross-Petitioner
v.
AEROJET-GENERAL CORPORATION, et al.,
Respondents

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

SUPPLEMENTAL BRIEF OF AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY OF MICHIGAN AND CORDOVA CHEMICAL COMPANY OPPOSING PETITIONS

John D. Tully*
Robert J. Jonker
Warner Norcross & Judd LLP
900 Old Kent Building, 111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487

*Counsel of Record

1 PP

RULE 29.6 STATEMENT

The parent company of Cordova Chemical Company of Michigan is Cordova Chemical Company. The parent company of Cordova Chemical Company is Aerojet-General Corporation. The parent company of Aerojet-General Corporation is GenCorp, a publicly traded company. The filing parties do not have non-wholly-owned subsidiaries, but Aerojet-General Corporation does hold less than 1% of the stock of Megabar Explosives Corp., a Utah corporation.

SUPPLEMENTAL ARGUMENT

The United States, No. 97-454, seeks review of the decision of the United States Court of Appeals for the Sixth Circuit in *United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572 (6th Cir. 1997) (en banc). The Michigan Department of Environmental Quality ("MDEQ"), No. 97-296, seeks review of only the portion of that decision affecting respondent CPC International, Inc. ("CPC"). CPC opposes the petitions but has also filed a conditional cross-petition, No. 97-464, regarding the decision in favor of respondent Aerojet-General Corp. ("Aerojet"). Aerojet has filed a Brief in Opposition to the petitions.

Aerojet submits this Supplemental Brief under Rule 15.8 to address two matters arising after the filing of its Brief in Opposition. The first new matter is the *en banc* decision of the Sixth Circuit in *Donahey v. Bogle*, ___ F.3d ___, 1997 U.S. App. LEXIS 32146 (6th Cir. Nov. 17, 1997). The second is the United States' request that the MDEQ's petition in No. 97-296 and CPC's conditional cross-petition in No. 97-464 be held in abeyance pending the Court's disposition of the United States' petition in No. 97-454.

1. On November 17, 1997, the United States Court of Appeals for the Sixth Circuit, sitting *en banc*, issued its opinion in the case of *Donahey v. Bogle, supra*. In *Donahey*, the Sixth Circuit again recognized the potential for both direct and derivative theories of operator liability under § 107(a)(2) of CERCLA. *Donahey* involved, among other things, the issue of the operator liability of a 100% stockholder of a polluting company. The Sixth Circuit found the veil-piercing analysis of *Cordova* equally applicable to *Donahey* and held that the 100% stockholder was on the facts of the case not liable as an operator for the cleanup of the property at issue. *Donahey*, 1997 U.S. App. LEXIS 32146, *15-

16. The Sixth Circuit in *Donahey* also noted that *Cordova* provided for § 107(a)(2) operator liability for parent corporations that "directly operate" a facility, but concluded that a scenario supporting such direct liability was not before the court in *Donahey*. *Id.* at *16 n.7. Thus, the Sixth Circuit has once again recognized both direct and derivative theories of operator lability, contrary to the claim of the United States. The only remaining issue is whether the Sixth Circuit properly applied the theories to the facts of both cases. This Court should not spend its time policing particular applications of settled legal theories.

2. The United States requests that the MDEQ's petition, No. 97-296, and CPC's conditional cross-petition, No. 97-464, be held in abeyance pending the Court's disposition of the United States' petition, No. 97-454, but the reason the United States gives for its request actually supports denial of all these petitions without delay. According to the United States, the MDEQ has a unique interest in the outcome of the case because the Michigan Court of Appeals has held that the MDEQ must reimburse Aerojet and its subsidiaries for any CERCLA liability they may incur at the site. As set forth in Aerojet's Brief in Opposition, *see* Aerojet Br. Opp. at 12, 16-17, the MDEQ's reimbursement obligation actually supports prompt denial of all petitions with regard to Aerojet, because taxpayers will bear the ultimate financial responsibility for any liability assigned to Aerojet and its subsidiaries — precisely the result the United States asserts that it seeks to avoid in filing its petition. Moreover, denial of the petitions with regard to Aerojet will still allow both the state and federal governments to obtain complete relief from CPC if they prevail on the merits. Accordingly, while Aerojet agrees that the MDEQ has a unique interest in the outcome of this case, such

interest does not justify holding some of the petitions in abeyance and further prolonging this already protracted litigation.[1]

The United States' submission also discloses another basis to deny the petitions on claims against Aerojet without delay. The United States notes that settlement discussions with the MDEQ and Aerojet could ultimately lead to an agreement that would moot the claims against Aerojet and bar any future contribution actions under § 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2).[2] This

---

[1] Even though none of the governmental parties could possibly be prejudiced by prompt denial of the United States' petition and CPC's conditional cross-petition on the claims against Aerojet, CPC argues that its potential contribution claim against Aerojet may be compromised. But CPC's argument ultimately dissolves into nothing more than a desperate plea to this Court to save CPC from the natural consequences of its own voluntary decision to abandon contribution claims in this litigation. In its Reply Brief, CPC attempts to dodge this problem by blatantly mischaracterizing Aerojet's position with a selective quotation from Aerojet's Brief in Opposition. Contrary to CPC's characterization, Aerojet has never claimed that CPC abandoned its contribution claims for all time, and has never challenged CPC's statement that contribution claims have been reasserted in a *new* lawsuit still pending in district court (No. 1:94-CV-432 (W.D. Mich.)). Aerojet has stated only that CPC abandoned its contribution claim *in this litigation,* which is indisputably true. Whether CPC has reasserted a contribution claim in new litigation involving a different matrix of parties and claims has no bearing on whether this Court should choose to review issues *in this litigation* that have no practical impact on claims remaining *in this litigation.*

[2] Even if no new settlement is reached, the 1977 Stipulation and Consent Order with the State of Michigan was itself a resolution of liability to the State within the meaning of § 113(f)(2) that should bar both the State's claim against Aerojet and the contribution claim asserted by CPC. The district court rejected this contention. The parties briefed

Court should not devote its resources to a matter that the petitioning party acknowledges may settle before hearing.

CONCLUSION

The Petition for a Writ of Certiorari filed by the United States (No. 97-454) should be denied. Alternatively, even if the Court decides to grant this petition, it should do so only with respect to the claims against CPC. The Court should further deny the Conditional Cross-Petition of CPC (No. 97-464).[3]

December 8, 1997

Respectfully submitted,

John D. Tully
John V. Byl
Robert J. Jonker
Dean F. Pacific

WARNER NORCROSS & JUDD LLP
900 Old Kent Building
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
Telephone: (616) 752-2000

---

the issue on appeal, but the Sixth Circuit did not address it. CPC's potential contribution claim, which is no longer a part of this litigation and which is not viable in any event under § 113(f)(2), does not provide a sufficient justification for granting certiorari on the claims against Aerojet.

[3] No relief is sought against Aerojet or its subsidiaries in the Petition of the MDEQ (No. 97-296).

Attorneys for Aerojet-General
Corporation, Cordova Chemical
Company of Michigan and
Cordova Chemical Company

José N. Uranga
Senior Counsel - Environmental Law
Aerojet-General Corporation
P. O. Box 13222
Sacramento, California 95813-6000
Co-Counsel for Aerojet-General Corporation,
Cordova Chemical Company of Michigan and
Cordova Chemical Company